UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, NASHVILLE RESIDENT OFFICE

TAYLOR MOTORS, INC.

Respondent

and **Cases 10–CA–141565**
10–CA–141578
10–CA–145467

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2022, AFL-CIO

Union

TAYLOR MOTORS, INC.

Employer

and **Case 10–RC–137728**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE), AFL–CIO, LOCAL 2022

Petitioner

COUNSEL FOR ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

Submitted by
Katherine Miller
Counsel for Acting General Counsel
National Labor Relations Board
Region 10 – Nashville Resident Office
810 Broadway, Room 302
Nashville, TN 37203

Table of Contents

Table of Authorities

I. Introduction

Counsel for Acting General Counsel respectfully submits this Answering Brief to Respondent Taylor Motors, Inc.'s Exceptions to the Administrative Law Judge's Supplemental Decision.[1] This Answering Brief specifically addresses each of Respondent's Exceptions numbered 1 through 15. Counsel for Acting General Counsel hereby requests that Respondent's exceptions be denied and that the Administrative Law Judge's Supplemental Decision be affirmed.[2] In support of this position, Counsel for Acting General Counsel offers the following:

II. Statement of the Case

A. Factual Background

Respondent runs a facility providing school bus transportation services for the Fort Campbell, Kentucky military base (TR 37:3-5). The Union, American Federation of Government Employees, Local 2022, AFL–CIO, is also located in Fort Campbell. During the summer of 2014, a group of Respondent's employees began the process of organizing in order to have the Union represent them.

In August 2014, two bus drivers employed by Respondent, Anthony Williams and Larry Cruthis, met with Union organizer Judy Hansford and received union authorization cards (TR 23:2-21). Both employee Williams and employee Cruthis began to talk to their fellow employees about the Union and solicit their signatures on the union authorization cards. On August 22, 2014, Williams was in his car in Respondent's parking lot when Transportation Director

[1] As of November 1, 2017, the Agency is led by an Acting General Counsel. However, the procedural history of this case took place under the General Counsel. Throughout this brief, references to past decisions or briefs that occurred while under direction from the General Counsel will be noted as such, with "Counsel for Acting General Counsel" reserved for any submissions occurring after November 1, 2017.

[2] Citations to the Administrative Law Judge's original decision will be referenced as "ALJD." Citations to the Administrative Law Judge's supplemental decision will be referenced as "ALJSD" followed by the appropriate page and line number. References to the hearing transcript will be referenced as "Tr." The Consolidated Complaint, Order Consolidating Cases, and Notice of Hearing will be referenced as "Complaint."

Charlotte Moore came up to him and asked him if he was passing out union cards. At this point, the Union had not filed a petition yet, and neither Williams nor Cruthis were openly advocating for the Union (TR 213:1-6; 245:21-25).

After securing enough signatures, the Union filed a representation petition which was docketed in the Region as Case 10–RC–137729. On November 6, 2014, the Region conducted an election in the break room at Respondent's facility. The break room is located next to a large space commonly referred to as the "bus bay" or "bus barn" by the employees. During this election, employee Williams openly advocated for the Union when employees were standing in line to vote. He passed out pens with the Union's name on it and encouraged his fellow employees to vote yes for the Union. The Union won this election by a vote of 33 for the Union and 32 against the Union.

On November 7, 2014, the day after the election, Respondent suspended employee Williams based on his alleged conduct during the election. Director Moore had received five written complaints against Williams from his fellow employees. Two of these complaints alleged that Williams had made a specific statement threatening violence. Another complaint asserted that Williams had threatened to "block" another employee from leaving without voting. Respondent decided to suspend Williams based solely on these allegations. Respondent subsequently discharged Williams on November 13, 2014, based on its cursory investigation into the allegations. Respondent did not question Williams as part of this investigation.

On November 12, 2014, Respondent filed objections to the election. Due to a variety of issues with the election, both parties agreed to set aside the results, and the Region ordered that a new election be held on January 15, 2015. On November 24, 2014, the Union filed two unfair labor practice charges against Respondent in Cases 10–CA–141565 and 10–CA–141578. The

charge in Case 10–CA–141565 contains allegations of unlawful interrogation and surveillance. The charge in Case 10–CA–141578 alleges that Respondent suspended and discharged Williams based on his union and protected concerted activities.

On January 15, 2015, the Region conducted a second election to determine whether the employees wished the Union to represent them. This election resulted in only 28 employees voting for the Union and 33 employees voting against union representation. On January 15, 2015, the Union filed objections to the second election. The Union filed a third unfair labor practice charge on January 30, 2015, in Case 10–CA–145467. The charge in that case alleges that Respondent maintained an overly broad confidentiality/non-disclosure agreement ("CNDA").

B. Procedural History

On February 20, 2015, the Regional Director issued a report on objections and order directing a hearing for five of the Union's objections. The Union subsequently requested withdrawal of two of these objections, leaving only three for the Judge to review. These three objections are also alleged as unfair labor practices, encompassing the same set of facts.

On February 23, 2015, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing. The Complaint alleged that Respondent violated Section 8(a)(1) and 8(a)(3) of the Act by unlawfully interrogating and surveilling its employees during a union campaign, maintaining an overbroad CNDA, and suspending and discharging employee Williams, based on his union and protected concerted activities. The unfair labor practices were consolidated with the Union's objections to the January 15, 2015 election, and, therefore, the Counsel for the General Counsel urged the Administrative Law Judge to set aside that election and order a new election.

Administrative Law Judge Keltner Locke presided over the hearing in this matter on April 22, 23, and 24, 2015. In lieu of briefs, Judge Locke heard oral arguments on the parties' positions on June 5, 2015. On July 14, 2015, Judge Locke issued his Decision (ALJD) in which he found four violations of the Act as alleged in the Complaint. Judge Locke found Respondent violated the Act by interrogating employees about their union activities, requiring employees to sign a CNDA, and by suspending and discharging employee Williams. Judge Locke recommended Respondent cease and desist from future unfair labor practices and take certain affirmative actions, including posting a notice to its employees, offering employee Williams immediate and full reinstatement to his former position and making him whole for the losses he suffered due to Respondent's unlawful discrimination, rescinding the overly-broad CNDA and notify all employees that the agreement is no longer in effect. Judge Locke also recommended the Board set aside the January 15, 2015 election based on these unfair labor practices.

On August 11, 2015, Respondent filed exceptions to the Administrative Law Judge's decision, arguing that the judge erroneously credited employee Williams' version of the events and incorrectly applied relevant Board precedent when he concluded that Williams' conduct was protected under the Act and that the ultimate burden was on Respondent under the *Burnup & Sims* analysis.[3]

On March 13, 2017, the Board remanded the cases back to the judge to clarify his credibility determinations and to make a clear and reasoned determination of whether the General Counsel carried his burden under *Burnup & Sims* to prove that Williams did not make the statement attributed to him. Furthermore, the Board directed the judge to consider whether the 2015 election should be set aside because of Respondent's suspension and discharge of

[3] *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

Williams and the Respondent's maintenance of the CDNA, should the judge again find these actions unlawful.

On September 29, 2017, the judge issued his Supplemental Decision (ALJSD). In that decision, the judge again credited employee Williams' version of the events and concluded Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and 8(a)(3) of the Act. Furthermore, based on these unfair labor practices, the judge concluded the January 15, 2015 election should be set aside.

Respondent excepts to many of Judge Locke's credibility findings, including the judge's decision to credit employee Williams' version of events over other witnesses. Respondent also asserts Judge Locke incorrectly applied Board precedent in finding that even if Williams had made the alleged statement, this action would still be protected under the Act. Respondent argues that Judge Locke incorrectly found that the CNDA would reasonably cause employees to believe they could not engaged in Section 7 activity as Respondent asserts this goes against Board precedent. Respondent concludes by contending that all of Judge Locke's conclusions of law, proposed remedies, and proposed Order be overturned, and urges the Board to conclude no violations of the Act occurred, dismiss the Complaint in its entirety, and finally, find the results from the January 15, 2015 representation election be allowed to stand.

Counsel for Acting General Counsel now responds to these exceptions.

III. Standard of Review

Many of Respondent's numerous exceptions take issue with Judge Locke's credibility resolutions. This case involved ten witnesses testifying about specific details that transpired during the course of a union campaign and a representation election. Many witnesses corroborated each other in some parts of their testimony yet contradicted each other regarding

other parts. Judge Locke had a wealth of testimony and documentary evidence to review in order to make his findings. It is well understood that "[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *D&F Industries*, 339 NLRB 618, fn. 1 (2003) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)). Despite Respondent's contrary claims, the judge articulated his rationale for each of his credibility determinations in his supplementary decision, all of which are supported by a clear preponderance of the evidence.

IV. Argument

A. The Judge Correctly Concluded Respondent Violated Section 8(a)(1) and 8(a)(3) of the Act by Suspending and Discharging Employee Williams.

Respondent asserts Judge Locke erred in finding that employee Williams was unlawfully suspended and discharged and raises these concerns through nine exceptions. The response to these exceptions can be grouped into two main sections. First, the judge properly found that employee Williams did not make the threatening statement attributed to him. The record fully supports the judge's conclusion not to credit the two witnesses who accused Williams of making the threat. Second, the judge correctly determined that even if Williams had made the alleged statements attributed to him, a reasonable employee would not have found the statement to be a threat sufficient to cause Williams to lose the protection of the Act. Based on this analysis, the judge properly found that Williams' suspension and discharge violated the Act.

1. The Judge Properly Considered all the Relevant Evidence and Correctly Determined that Employee Williams Did Not Make the Threatening Statements Attributed to Him During the November 6, 2014 Election (Respondent's Exceptions 1-3)

Respondent excepts to the judge' finding that employee Williams' denial of making the threatening statement attributed to him is more credible and reliable than employees Terri Nolan's and Janice Schwenz's testimony accusing Williams of making this threat, because the credibility determination is erroneous and because Williams' denial is not supported by the preponderance of the evidence (Respondent's Exception 1). Respondent excepts to the judge's conclusion that the General Counsel has proven that the asserted misconduct did not occur because the conclusion is not supported by the preponderance of evidence (Respondent's Exception 2). Last, Respondent excepts to the judge's finding that the General Counsel satisfied its burden under the *Burnup & Sims* framework, because that conclusion is not in accord with Board precedent nor is it supported by a preponderance of evidence in the record (Respondent's Exception 3).

Respondent suspended and discharged employee Williams based solely on his alleged racially-charged threat of violence uttered during the election on November 6, 2014, and a second alleged statement that Williams threatened to block a driveway to prevent an employee from leaving during the election (TR 55:10-14; 56:17-23; 60:12-20). Five employees complained about Williams' conduct during the election and wrote down their complaints in statements given to Director Moore (GC Exs. 3-7).[4] One of these statements, written by employee Mary Jane Dotson, accused Williams of telling another employee that he would block the driveway to prevent that employee from leaving (GC Ex. 5). Two of these statements, written by employees

[4] The following employees submitted written complaints to Respondent regarding the November 6, 2014 election and Williams' conduct: Terri Nolan, Janice Schwenz, Mary Jane Dotson, Beate Poston, and Karla Livingston. Only Livingston did not testify at the trial.

Nolan and Schwenz, accused Williams of telling employees that they had better vote yes for the Union or else he would put a rope around their neck and hang them from a tree like they did on Litwin Street for the Halloween Joke and the way "y'all" did to "us" back in the 1960s (GC Exs. 3-4; TR 138:21-25; 139:1-3; 152:9-12).

This mention of "Litwin Street" on Halloween referred to an incident that occurred on the Fort Campbell base at a residence where an attempt at Halloween decorations depicted effigies of a family hanging via ropes from trees as if in a lynching, and these effigies had black trash bags for faces, seemingly depicting an African-American family (ALJSD 2:fn.1; Respondent Ex. 1). This residence was on some of the bud drivers' routes and many of them went to see it and later discussed it. Williams specifically and repeatedly denied uttering any threat of violence, making any statement regarding a hanging, or "Litwin street," and denied threatening to stop anybody from leaving the polling area (TR 256:11-19; 257:15-23; 274:9-16). Despite Respondent's arguments, this was not a mere exculpatory or categorical denial, but a clear, specific denial of statements that Williams never made.

The November 6, 2014 representation election occurred at Respondent's facility in the "bus bay" area and lasted from 9:00 a.m. to 10:30 a.m. During the trial, seven employees testified about their recollections of the election.[5] All seven witnesses testified that employee Williams is a loud person. Many of the witnesses further commented that Williams can be boisterous and annoying. It is uncontroverted that during the election, Williams walked around the bus bay, talked to employees in line, handed out Union pens to employees, encouraged the employees to vote and to vote for the Union, and showed people a pro-Union picture on his cell phone which was a graphic depicting a box with a checkmark in it for the Union.

[5] These witnesses are (in order of their testimony) Nolan, Schwenz, Poston, Cruthis, Williams, Fenwick, and Dotson.

Williams testified about specific statements and comments he made while walking around the bus bay. He testified that he urged people to vote for the Union. He told people not to leave because if they did not vote, their vote would not count and every vote mattered. He repeated this to many people as he walked around handing out Union pens (TR 256:6-19). He told people to smile and that today was going to be a good day (TR 256:9-10). These statements were corroborated by many of the employees who later lodged complaints against Williams. Employee Nolan heard Williams tell people that "we better not leave" (TR 125:14-17). Employee Schwenz heard him say something about not leaving until you vote (TR 160:21-25; 161:3-8). Mary Jane Dotson testified that Williams kept saying that it was a good day and he told people to smile (TR 341:12-18; 348:15-25). The fact that other witnesses corroborated Williams' testimony about the many things he did say bolsters Williams' credibility regarding the statements he denied making. Williams did not merely "categorically" deny making threats of violence; he specifically denied uttering anything about Litwin Street, hanging, or blocking people in a driveway. Frankly, it is unclear how Respondent thinks a person should deny a statement that never occurred since any such denial would always be "exculpatory" if the person denied a troublesome statement attributed to him or her. The only way to deny such a statement is to say, "I never said that," which is precisely what Williams repeatedly testified. Therefore, the judge had to consider whether to believe Williams' specific denial of this conduct, or the conflicting testimony from other witnesses concerning the alleged threats.

In his ALJSD, Judge Locke clarified his decision to credit Williams' specific denial of the threats attributed to him. Judge Locke specifically explained that he decided to discredit Nolen's and Schwenz's testimony regarding the alleged threat because of the inconsistencies in Nolen's and Schwenz's testimony and the lack of corroboration by other witnesses whom both

Nolen and Schwenz testified were also present for the alleged statement (ALJSD 8:9-25). Respondent attempts to downplay the inconsistencies between Nolen's and Schwenz's recollection of the threatening statement but Judge Locke clearly relied not just on these inconsistencies, but also on the lack of corroboration by the two other people that both Nolen and Schwenz testified were not only present for the threat, but also reacted to it: employees Dotson and Poston.

Nolen and Schwenz corroborated each other regarding a number of details surrounding the alleged incident. Thus, both Nolen and Schwenz testified that Williams made the threat regarding hanging people while they were standing in line (TR 127:20-25; 128:1-5; 152:2-21). They each memorialized this in a written statement that same day (GC Exs. 3, 4). Both Nolen and Schwenz testified that Williams was talking quite loudly as he walked up and down the line (TR 128:15-16; 151:19-23). Although evidence showed the bus bay was quite noisy during the election, Nolen testified that "you could hear what was going on" (TR 126:1-3). They also specifically testified that employees Dotson and Poston were right beside them when Williams purportedly made this statement (TR 128:3-5; 150:2-12). Nolen specifically recalled looking over at Schwenz, Poston, and Dotson after Williams made the statement to see their reactions to it and they all exchanged glances with each other (TR 128:22-25; 129:1-6).

Despite these consistencies, Nolen's and Schwenz's testimony did not line up when it came to the specific details surrounding the alleged statement. Nolen testified that after Williams uttered this threat, she told him that it was not very funny and he just laughed in response (TR 128:17-21). However, Schwenz did not recall Nolen saying anything in response to Williams' statement. Instead, she testified that Poston told Williams it would be best if Williams got away from them (TR 155:1-14). Respondent asserts that Schwenz was merely mistaken in recalling

which colleague had responded to Williams owing to the fact that the trial occurred five and a half months after the incident at issue. However during the trial, Schwenz was asked multiple times about Williams making the alleged threat, and she consistently testified that only Poston responded to Williams (TR 155:1-8). Additionally, Nolen's and Schwenz's testimony differed in another manner regarding the threat. Nolen testified that Williams just uttered this threat along with the other statements he was making about the Union (TR 128:1-24, 138:25, 139:1-3). Schwenz testified that Williams was near them talking about the Union and "one of the girls asked him, well, what if it doesn't go your way," and this question prompted Williams to utter his alleged threat. (TR 152:5-12). Although both Nolen and Schwenz seemed to have heard the same alleged threat, the inconsistent details surrounding this threat are a clear factor weighing against their credibility, and Judge Locke properly considered it as such.

Judge Locke's decision to discredit Nolen's and Schwenz's testimony regarding Williams' alleged threat is not solely couched in the inconsistency over who responded to Williams. Rather, Judge Locke also relies on the testimony of two other witnesses, employees Poston and Dotson, whom both Nolen and Schwenz claimed were present for, and reacted to, the alleged threat. Contrary to Nolen's and Schwenz's testimony, neither Poston nor Dotson heard Williams make any reference to Litwin Street or hanging people at all during the election. According to all four witnesses, they stood next to or near each other in line while waiting to vote. All four witnesses also testified that they heard Williams make various statements regarding the Union campaign while they were in line to vote and they all testified Williams was very loud and being quite annoying that day. Nolen and Schwenz both recalled Dotson and Poston not only being in the immediate vicinity, but either exchanging a significant look after the

statement (Dotson) or actually replying to Williams after the statement (Poston). That neither Dotson nor Poston heard such a threat clearly undermines the credibility of Nolen and Schwenz.

Respondent argues that Judge Locke's finding that neither Dotson nor Poston were within "earshot" of Williams contradicts his finding that Dotson and Poston's testimony proves that Williams did not make the statement. However, Judge Locke's discussion of "earshot" in the ALJSD is a clarification to his original decision in which he held that three witnesses (Dotson, Poston, and employee Sandra Fenwick) were within "earshot" of employee Williams at all times while the employees were lined up to vote. In the ALJSD, Judge Locke correctly finds that all the employees were moving about during the election and Williams spent much time moving up and down the line. Because of this, Dotson, Poston, and Fenwick could not be reasonably "within earshot" for the entirety of the election (ALJSD 5:4-9). However, this conclusion does not contradict Judge Locke's later conclusion that Dotson and Poston were next to Williams, Nolen, and Schwenz when the alleged threat was made. Both Nolen and Schwenz testified that Dotson and Poston stood next to them in line, and specifically that Dotson and Poston were present when Williams made his alleged threat. Both Dotson and Poston testified that they stood near Nolen and Schwenz in line, and heard Williams make statements urging people to go vote and vote for the Union, statements that Nolen and Schwenz also heard. However, neither Dotson nor Poston heard Williams say anything about "hanging" or "Litwin Street" or anything even remotely resembling those remarks.

According to Nolen and Schwenz, Williams made this alleged threat loudly and his statement was not directed to anyone in particular, but rather to the group in line. If Nolen and Schwenz are to be believed, Dotson and Poston would have also heard the statement and been able to testify as such. The key is not merely that Nolen and Schwenz need further corroboration

of their testimony, but rather that Dotson and Poston should have heard the threat because Nolen and Schwenz testified that Dotson and Poston reacted to the threat. The fact that Dotson and Poston testified that they did not hear Williams make any statement regarding hanging or Litwin street demonstrates that Nolen and Schwenz were either mistaken in their recollection, or that the statement was not uttered. By itself, this might not be sufficient evidence for the Acting General Counsel to meet its burden of proof, but coupled with employee Williams' specific and credible denials of making this statement, the credibility analysis tips in the Acting General Counsel's favor. Judge Locke's reliance on this lack of further corroboration is not erroneous and is clearly supported by the preponderance of the record evidence.

Respondent's Exceptions 2 and 3 argue that the judge incorrectly found that General Counsel proved the alleged misconduct did not occur and excepts to the finding that the General Counsel satisfied his burden under the *Burnup & Sims*. As summarized by Judge Locke: "When an employer discharges an employee for misconduct arising out of a protected activity, the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. Once the employer establishes that it had such an honest belief, the burden shifts to General Counsel to affirmatively show that the misconduct did not in fact occur" (ALJD 39:24-30). *Pepsi-Cola Co.*, 330 NLRB 474 (2000).

In concluding that the General Counsel met his burden to show that the alleged misconduct did not occur, Judge Locke revisited his logic from his original decision, and explained where his initial error took place. As stated above, the Acting General Counsel must affirmatively show the misconduct did not take place. In his original decision, Judge Locke found Williams, Nolen, and Schwenz equally credible. Based on this, Judge Locke realized he could not determine whether Williams had made the statement because the "did make the

statement pan" equally balanced out the "did not make the statement pan" (ALJSD 8-9). Judge Locke had erroneously concluded that if a preponderance of the evidence did not prove that Williams "did" make the statement, this meant that the preponderance of the evidence proved that Williams "did not" make the statement.

Judge Locke corrected this logical error in his ALJSD by specifically finding that Williams' testimony regarding the alleged threat is more credible than Nolen's and Schwenz's testimony. In making this finding, Judge Locke affirmatively found that the Acting General Counsel did prove that Williams did not engage in the misconduct because Judge Locke found Williams' specific denials more credible. Additionally, that Nolen's and Schwenz's recollections of the threat had a key inconsistency and were unsupported by the other witnesses purportedly present for the threat led Judge Locke to discredit their testimony. As discussed above, both Nolen and Schwenz, who allegedly heard the hanging threat, testified that Poston and Dotson were within earshot of Williams and appeared to also witness the threat. Yet both Poston and Dotson affirmatively testified that they did not hear Williams make any comment regarding hanging or Litwin Street. These two denials, coupled with Williams' credible denial of making any such statement, tipped the scales in Judge Locke's reasoning. Therefore, a preponderance of evidence affirmatively shows that Williams did not make the alleged threats as reported to management and the Acting General Counsel properly met its burden under *Burnup & Sims*.

Judge Locke incorporated his original decision into his ALJSD and the original decision discussed the fact that Williams had engaged in protected activity and Respondent discharged him for alleged misconduct arising from that activity. Because Respondent had a mistaken but honest belief of this misconduct, and because the Acting General Counsel can affirmatively prove that Williams did not engage in the misconduct, the *Burnup & Sims* analysis is complete

and supports Judge Locke's conclusion that Respondent violated Section 8(a)(1) and (3) by suspending and discharging Williams.

2. The Judge Properly Determined that the Alleged Threatening Statements Did Not Lose the Protection of the Act (Respondent's Exceptions 4-7, 10)

In his ALJSD, Judge Locke alternatively found that even if Williams had made the alleged threatening statement regarding "hanging," Williams' misconduct was not sufficiently so opprobrious as to deprive him of the Act's protection (ALJSD 10:1-2). Respondent excepts to this overall conclusion and to many details inherent in Judge Locke's conclusion. In Exception 4, Respondent excepts to Judge Locke's conclusion that a reasonable person would have viewed Williams' statement as humor rather than a threat based on Williams' "jovial" mood. In Exception 5, Respondent excepts to Judge Locke's finding that this statement did not constitute threats of physical violence and did not create a racially-charged environment or one of intimidation. In Exception 6, Respondent excepts to Judge Locke's conclusion that nothing in the record suggests that Williams had the ability or intention of hanging anyone. In Exception 7, Respondent excepts to Judge Locke's finding that Williams' words would not have been regarded as a threat or intent to intimidate, but rather would be viewed as an attempt at humor. In Exception 10, Respondent excepts to Judge Locke's ultimate conclusion that the statements attributed to Williams were not so opprobrious so as to lose the Act's protection. All of these exceptions essentially take issue with Judge Locke's reasoning that Williams' statement, if made, was not threatening and, therefore, should not lose the Act's protection.

In its Exceptions Brief, Respondent mistakenly relies on *Int'l Baking Co.*, 342 NLRB 136, 148 (2004) to show that Williams' conduct was not protected. In that case, the Board analyzed the disciminatee's conduct under the *Wright Line* standard and adopted the judge's finding that the Employer would have discharged the discriminatee regardless of his protected

activity because he had made threats of violence and those threats removed him from the Act's protection. Respondent also cites to *Chicago Metallic Corp.*, 273 NLRB 1677, 1702 (1985), for the proposition that unambiguous threats of violence are outside the Act's protection. Both of these cases involve clear unambiguous threats of violence in which the circumstances surrounding the threat clearly indicated that the speaker was attempting to intimidate the listeners. Such a fact pattern is not present here as there is no evidence that Williams' conduct had any malice or underlying intimidation intent.

Judge Locke applied an objective standard factoring in the totality of the circumstances to see if Williams' alleged statement would threaten the reasonable listener. Judge Locke applied a standard for misconduct taken from cases involving striker violence and misconduct. The key is "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act" (ALJSD 10:10-14). Judge Locke noted how almost all the witnesses testified that Williams appeared to be in a happy mood while loudly going about his business on election day. As Judge Locke notes, the same sentence can have vastly different meanings based on how it is conveyed – whether the speaker is smiling or glaring (ALJSD 11:3-7). Furthermore, Judge Locke's statement that a reasonable person would regard Williams' alleged statement as an attempt at humor is further supported by the record. Employee Nolan testified that she responded to Williams' alleged threat by telling him it was not very funny and he responded by laughing. Additionally, Nolan also testified that she viewed the original display on Litwin Street to be more of a "Halloween joke" rather than an upsetting display (TR 145:11-22). Judge Locke's finding that Williams' statement was a bad attempt at humor is supported by Respondent's main witness to the alleged threat.

There is no evidence in the record that either Nolan or Schwenz (or any other employee within hearing distance) thought Williams' statement to be so threatening that they had to take immediate action. No one left the line, or moved away from him, or immediately reported such a threat of violence to managers or other authorities, but only complained to management after the voting had ended. That fact, coupled with employee Nolan's belief that Williams was making a joke, lends credence to the judge's finding that this alleged statement would be viewed by a reasonable person as attempted humor rather than attempted intimidation.

Contrary to Respondent's contention, *Atlantic Steel* is not the appropriate framework to apply to this situation.[6] The Board has specifically held that the *Atlantic Steel* framework is "tailored to workplace confrontations with the employer." *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014) affd. 629 Fed. Appx. 33 (2d Cir. 2015). *Atlantic Steel* is meant to balance employee rights with the employer's interest in maintaining order in the workplace and it is typically applied to analyze whether direct confrontations between an employee and a manager or supervisor constitute conduct so opprobrious that the employee loses the protection of the Act. Id. Employee misconduct towards other employees, as alleged here, is similar to picket-line issues and Judge Locke correctly applied the standards taken from many strike cases. Racially-charged statements have retained the Act's protection when they were not accompanied by aggressive behavior. See *Airo Die Casting*, 347 NLRB 810, 812 (2016). In such cases, the Board has considered whether the speaker accompanied the alleged threat with any gestures or movements to lead the listeners to conclude that the threat might be carried out. See *Copper Tire & Rubber Co.*, 363 NLRB no. 194, slip op. at 8 (2016). Based on this line of reasoning, it makes sense for Judge Locke to discern whether there was any evidence that Williams had the actual

[6] *Atlantic Steel*, 245 NLRB 814 (1979).

ability or intention to carry out this threat. Judge Locke correctly notes that there is nothing in the record to show that Williams had such ability or intention, and Respondent does not cite to any section of the record to disprove this notion. Therefore Judge Locke did not err in making this finding in the ALJSD.

Based on the totality of the circumstances, Judge Locke correctly determined that a reasonable listener would not have found Williams' alleged statement to be a credible threat, and, therefore, this alleged statement, if made, did not lose the protection of the Act. However, Acting General Counsel asserts this analysis is unnecessary based on Judge Locke's credible and reasonable findings that Williams did not make the alleged threat in the first instance.

3. The Judge Properly Concluded that the Discharge of Employee Williams violated the Act. (Respondent's Exception 8)

In Exception 8, Respondent asserts that Judge Locke erred in concluding that the discharge of Williams violated the Act because the conclusion is not supported by a preponderance of the evidence in the record. As previously discussed, Respondent suspended and discharged Williams based on his alleged threats. The threats arose in the context of Williams' protected activity and, therefore, the correct framework is the *Burnup & Sims* standard. Under this framework, Respondent must establish that it had an honest belief that Williams engaged in the misconduct attributed to him, and then the burden shifts to General Counsel to show that Williams did not engage in the this misconduct. As explained above, contrary to Respondent's position, Judge Locke correctly concluded Williams did not engage in the alleged misconduct. Therefore Acting General Counsel met its burden under *Burnup & Sims* to demonstrate that Respondent violated the Act by suspending and discharging Williams based on its mistaken belief that Williams engaged in misconduct. As this amounts to Respondent suspending and discharging Williams for his protected union activity, Respondent's actions

violated the Act, and Judge Locke's same conclusion is supported by the preponderance of the evidence.

B. The Judge Properly Found Respondent Violated the Act by Maintaining an Overbroad CNDA (Respondent's Exception 11)

As noted by Respondent, Judge Locke relied on his analysis and findings from his original decision to conclude that Respondent violated the Act by maintaining an overbroad CNDA (ALJSD 12:14-24). Thus, Respondent incorporated and relied on its Brief Excepting to the ALJD to support this exception. Following Judge Locke and Respondent's example, Acting General Counsel hereby incorporates and relies on its Answering Brief to Respondent's Exceptions to the ALJD to explain how Judge Locke properly applied current precedent and that his findings do not go against the preponderance of the evidence.[7]

C. The Judge Properly Found Respondent's Conduct Described Above Materially Affected the Results of the January 15, 2015 Representation Election (Respondent's Exceptions 9 and 12)

Respondent excepts to Judge Locke's finding that the January 15, 2015 representation election should be set aside based upon Respondent's unlawful actions. Specifically, Respondent's Exception 9 challenges the judge's finding that Williams' discharge had a coercive effect on this second election because the conclusion is not supported by a preponderance of the evidence. Additionally, Respondent's Exception 11 challenges the judge's finding that the CNDA agreement "destroyed the laboratory condition necessary for a fair and uncoerced election" because that conclusion is not supported by the preponderance of the evidence in the record. It should be noted that Respondent does not expound upon these exceptions in its Brief in Support of Exceptions to the ALJSD, but Acting General Counsel will respond to the exceptions themselves regardless.

[7] The pertinent pages of General Counsel's Answering Brief to Respondent's Exceptions to the ALJD are pages 29-31.

In both the ALJD and the ALJSD, Judge Locke determined the election should be set aside based on Respondent's unlawful actions of suspending and discharging Williams, and by maintaining an unlawful CDNA. As further noted in the ALJSD, Judge Locke noted the timing of Williams' suspension and discharge and how the coercive nature of these events still lingered over the second election. It is important to note that Williams' suspension and discharge occurred during the critical period, which begins on the date of the first election and extends until the date of the second election. *Star Kist Caribe,* 325 NLRB 304 (1998). As a result of Williams' discipline, not only did the Union lose an eligible voter, but his discharge cast a chilling pall over the entire unionization process – effectively infringing upon the employees' free choice regarding whether they desired to be represented by the Union.

Respondent takes exception to the Judge Locke's finding that the CNDA "destroyed the laboratory conditions necessary for a fair and uncoerced election." Judge Locke explained that the CNDA is unlawful because a reasonable employee would read it to prohibit disclosure of pay rates, benefits, and limit employees' ability to speak with Union representatives and each other regarding working conditions. Judge Locke noted that this type of prohibition chills discussions about terms and conditions of employment, thus interfering with the "laboratory conditions" required for a fair election. Judge Locke correctly notes that the first election was only decided in the Union's favor by one vote. Some employees may have felt they could not discuss their working conditions with union representatives; had this unlawful policy not been in place, it is likely the Union's margin of victory would have been greater, and may have weathered the storm caused by Williams' unlawful discharge. In *Purple Communications,* 361 NLRB 575, 578 (2014), the Board upheld the judge's finding that the mere maintenance of an overly broad rule constituted objectionable conduct. In that situation, the rule had been in effect for at least a year

prior to the election, yet it was still found to violate 8(a)(1) and constitute grounds for overturning the election results, especially in light of the close election results in that case. Id. at 579. Similarly, Judge Locke properly concluded that Respondent's unlawful conduct in maintaining an overly broad confidentiality agreement and disciplining Williams for his protected activity, constituted objectionable conduct warranting a new election.

D. The Judge's Conclusions of Law, Proposed Remedies, and Proposed Order Should be Adopted by the Board (Respondent's Exceptions 13-15)

Respondent's final three exceptions take issue with the judge's ultimate conclusions and remedies. Respondent does not elaborate on these specific exceptions in its ALJD Exceptions Brief or its ALJSD Exceptions Brief. However, it is easily understood that if the Board were to agree with any of Respondent's exceptions, portions of the judge's conclusions of law, proposed remedies, and proposed order would have to be altered. Counsel for Acting General Counsel asserts that the judge properly considered all the facts in the record and made sound credibility determinations based on the evidence presented. Therefore, his findings of fact should not be overturned. Additionally, the judge properly applied well-known Board precedent to the various issues in this proceeding, and his analysis was not in error. Therefore, Judge Locke's conclusions of law should be adopted by the Board. Lastly, the judge's Proposed Remedies and Order are fully in accord with established Board law and should be adopted by the Board. [8]

[8] Counsel for Acting General Counsel requests that the Board correct an apparent inadvertent typo in the ALJSD. In the ALJSD, Judge Locke found that Respondent's suspension and discharge of Williams violated Section 8(a)(1) and (3) of the Act (ALJSD 13:1 and 20). However, in his Order on page 14 paragraph (e) of the ALJSD, Judge Locke seems to have inadvertently left out an "and": "Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension discharge of Anthony Williams…" (emphasis added). Counsel for Acting General Counsel requests the Board Order note that Respondent should remove from its files any reference to the unlawful suspension, and any reference to the unlawful discharge.

V. Conclusion

Counsel for Acting General Counsel respectfully submits that Respondent's exceptions to the ALJSD and the ALJD are unsupported by the record and law, and should be denied in their entirety. The judge's findings of fact and conclusions of law are fully supported by the record evidence. For all of these reasons, the judge's decision that Respondent violated the Act by interrogating employee Williams, suspending and discharging him, and maintaining an unlawful CNDA should be upheld. Furthermore, the judge's determination that the Union's objections to the election are sufficient to order a new election should be upheld, and his recommendation that the January 15, 2015 election results be set aside should be adopted.

Submitted this 7th day of November 2017.

/s/ Katherine Miller
Katherine Miller
Counsel for Acting General Counsel
National Labor Relations Board
Region 10
Nashville Resident Office
810 Broadway, Room 302
Nashville, TN 37203

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Counsel for Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Supplemental Decision have been served by electronic mail on Tuesday, November 07, 2017, on the following:

Christopher M. Caiaccio, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart
One Ninety One Peachtree Tower
191 Peachtree St NE Ste 4800
Atlanta, GA 30303-1762
chris.caiaccio@ogletreedeakins.com

Michael Johnson, Esq.
Ogletree Deakins Nash Smoak & Stewart
401 Commerce St Ste 1200
Nashville, TN 37219-2491
michael.johnson@ogletreedeakins.com

Judy Hansford
Executive Vice President
A.F.G.E., Local 2022, AFL-CIO
2110 Indiana Avenue
P.O. Box 453
Ft. Campbell, KY 42223
judy.hansford@afge2022.org

/s/ Katherine Miller
Katherine Miller
Counsel for Acting General Counsel
National Labor Relations Board
Region 10
Nashville Resident Office
810 Broadway, Room 302
Nashville, TN 37203